

FILED BY CLERK

JAN 12 2011

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	2 CA-CR 2010-0291-PR
)	DEPARTMENT B
Respondent,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 111, Rules of
RICARDO LONGORIA,)	the Supreme Court
)	
Petitioner.)	
_____)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF GILA COUNTY

Cause Nos. CR99711, CR99724, and CR00121

Honorable R. Douglas Holt, Judge

REVIEW GRANTED; RELIEF DENIED

Ricardo Longoria

Florence
In Propria Persona

V Á S Q U E Z, Presiding Judge.

¶1 Petitioner Ricardo Longoria seeks review of the trial court’s order denying his petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P., in which he alleged ineffective assistance of counsel. “We will not disturb a trial court’s ruling on a petition for post-conviction relief absent a clear abuse of discretion.” *State v.*

Swoopes, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). Longoria has not sustained his burden of establishing any such abuse here.

¶2 Pursuant to a plea agreement, Longoria pled guilty in three criminal actions to theft of a means of transportation, armed robbery, kidnapping, aggravated assault, and two counts of escape. Under former A.R.S. § 12-604.02(A), Longoria was not “eligible for suspension or commutation or release on any basis” from the terms of imprisonment imposed for his robbery, kidnapping, and assault convictions.¹ 1999 Ariz. Sess. Laws, ch. 261, § 7.

¶3 In 2002, this court granted partial relief on Longoria’s first petition for review and remanded the matter to the trial court. *State v. Longoria*, No. 2 CA-CR 01-0290-PR (memorandum decision filed Jan. 8, 2002). After an evidentiary hearing, that court again denied Longoria’s petition for post-conviction relief, and this court denied relief on his petition for review as well. *State v. Longoria*, No. 2 CA-CR 2002-0359-PR (memorandum decision filed Oct. 28, 2003). Longoria thereafter unsuccessfully petitioned for post-conviction relief again and this court denied relief on his petition for review. *State v. Longoria*, No. 2 CA-CR 2006-0438-PR (memorandum decision filed June 27, 2007). Longoria petitioned again for post-conviction relief in December 2008

¹On Longoria’s escape convictions and his theft of a means of transportation conviction, he was subject to former § 13-604.02(B), which provided that he was “not eligible for suspension of sentence, probation, pardon or release from confinement” absent one of several enumerated exceptions. 1999 Ariz. Sess. Laws, ch. 261, § 7.

and, after a hearing, the trial court denied relief in 2009. It appears that Longoria did not seek our review of that decision.

¶4 A few months later, Longoria initiated his fourth Rule 32 proceeding, arguing that his counsel at both his change-of-plea hearing and his sentencing had been ineffective because they had not explained to him that he would be sentenced to so-called “flat time” under former A.R.S. § 12-604.02(A). He also maintained his initial Rule 32 counsel had been ineffective in “doing nothing” to clarify his sentences. He further alleged that, although these claims had not been raised in his previous petitions, they were not precluded because he had not known he had received a “flat time” sentence until the Arizona Department of Corrections notified him in 2009, and that, therefore, his “failure to file a timely notice of post-conviction relief or notice of appeal was without fault on [his] part.” The trial court ruled Longoria’s claims were precluded and denied relief.

¶5 In his petition for review, Longoria argues the trial court abused its discretion in concluding his claims are precluded because he raised them “as soon as [he] became aware” that he had been sentenced to “flat time.” We disagree. As the court determined, Longoria either did not raise these issues in his previous petitions, or, if he raised them, we presume they were decided on the merits. *See State v. Wilson*, 169 Ariz. 17, 19 n.1, 875 P.2d 1322, 1324 n.1 (App. 1993). In either event, the claims are now precluded. *See Ariz. R. Crim. P. 32.2(a)(2), (3)* (claims precluded if decided on merits or waived in prior collateral proceeding).

¶6 Essentially, Longoria appears to argue the fact of his “flat time” sentence was a newly discovered material fact under Rule 32.1(e), one of the grounds for relief excepted from the general rule of preclusion.² See Ariz. R. Crim. P. 32.2(b). “In order to be entitled to post-conviction relief on the ground of newly discovered evidence under Rule 32.1(e), a defendant must establish that the evidence was discovered after trial although it existed before trial [and] that it could not have been discovered and produced at trial through reasonable diligence” *State v. Saenz*, 197 Ariz. 487, ¶ 7, 4 P.3d 1030, 1032 (App. 2000).

¶7 In this case, the trial court discussed the fact that § 13-604.02(A) “requires day-for-day service” at Longoria’s sentencing, in his presence. And, in imposing Longoria’s sentences shortly thereafter, the court clearly stated § 13-604.02(A) would apply. Thus, the facts on which Longoria relies in his petition were presented to him at his sentencing, well before his first petition for post-conviction relief was filed. His claims do not, therefore, qualify under the exception to preclusion provided by Rule 32.1(e) and the trial court did not abuse its discretion in finding them precluded.

¶8 Longoria also argues, without citation to supporting authority, that his sentence was enhanced unlawfully because the state did not provide notice that it would

²Although Longoria cited Rule 32.1(f) as a non-precluded ground for relief in his notice below, Rule 32.1(f) applies when “[t]he defendant’s failure to file a notice of post-conviction relief of-right or notice of appeal within the prescribed time was without fault on the defendant’s part.” Longoria makes no argument relating to the timeliness of his notice of post-conviction relief of-right, which he was required to file, and apparently did file, “within ninety days after the entry of judgment and sentence.” Ariz. R. Crim. P. 32.4(a). We reviewed the decision entered in that first Rule 32 proceeding in 2002.

seek sentencing pursuant to § 13-604.02 in one of the causes. Longoria did not, however, raise this claim in his petition below, and this court will not consider for the first time on review issues that have neither been presented to, nor ruled on by, the trial court. *State v. Ramirez*, 126 Ariz. 464, 468, 616 P.2d 924, 928 (App. 1980); *see also* Ariz. R. Crim. P. 32.9(c)(1)(ii) (petition for review shall contain “[t]he issues which were decided by the trial court and which the defendant wishes to present” for review). Thus, although we grant Longoria’s petition for review, we deny relief.

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

CONCURRING:

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Judge

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge